

as part of the prime contractor's settlement proposal, settlements of terminated lower tier subcontracts concluded by any of the prime contractor's immediate or lower tier subcontractors who have been granted authority as prime contractors to settle subcontracts; *provided*, that the settlement is within the limit of the authority. Authorization to settle proposals of lower tier subcontractors shall not be granted directly to subcontractors. However, a prime contractor authorized to approve subcontractor settlements may also exercise this authority in its capacity as a subcontractor, with respect to its terminated subcontracts and orders. When exercising this authority as a subcontractor, the contractor shall notify the purchaser.

(4) The provisions of subparagraphs (1), (2), and (3) above shall not apply to contracts under the administration of any contracting officer if the contracting officer so notifies the prime contractor concerned. This notice shall (i) be in writing, and (ii) if subparagraph (3) above is involved, specify any subcontractor affected.

(b) Section 45.602 shall apply to disposal of completed end items allocable to the terminated subcontract. However, these items may be disposed of without review by the TCO under 49.108-3 and without screening under 45.602-3, if the items do not require demilitarization and the total amount (at the subcontract price) when added to the amount of the settlement does not exceed the amount authorized under this subsection.

(c) A TCO granting the authorization in subparagraph (a)(1) above shall periodically (at least annually) make a selective review of settlements and settlement procedures to determine if the contractor is making adequate reviews and fair settlements, and whether the authorization should remain in effect. The TCO shall obtain the advice and recommendations of the appropriate audit agency and the cognizant plant clearance officer. When it is determined that the contractor's procedures are not adequate, or that improper settlements are being made, or when the authority has not been used in the preceding 2 years, the TCO shall revoke the authorization by written notice to

the contractor, effective on the date of receipt.

(d) The contractor may make any number of separate settlements with a single subcontractor but shall not divide settlement proposals solely to bring them under an authorization limit. Separate settlement proposals that would normally be included in a single proposal, such as those based on a series of separate orders for the same item under one contract, shall be consolidated whenever possible.

(e) Upon written request of the contractor, the TCO may increase an authorization granted under subparagraph (a)(1) of this subsection to authorize the contractor to conclude settlements under a particular prime contract. The TCO may limit the increased authorization to specific subcontracts or classes of subcontracts.

(f) Authorizations granted under this 49.108-4 shall not authorize the settlement of requisitions or orders placed with any unit within the contractor's corporate entity.

(g) Recommended formats for a request to settle subcontractor settlement proposals and the TCO's letter of authorization to the contractor are in 49.605 and 49.606, respectively.

[48 FR 42447, Sept. 19, 1983, as amended at 55 FR 52797, Dec. 21, 1990; 69 FR 17748, Apr. 5, 2004]

49.108-5 Recognition of judgments and arbitration awards.

(a) When a subcontractor obtains a final judgment against a prime contractor, the TCO shall, for the purposes of settling the prime contract, treat the amount of the judgment as a cost of settling with the contractor, to the extent the judgment is properly allocable to the terminated portion of the prime contract, if—

(1) The prime contractor has made reasonable efforts to include in the subcontract a termination clause described in 49.502(e), 49.503(c), or a similar clause excluding payment of anticipatory profits or consequential damages;

(2) The provisions of the subcontract relating to the rights of the parties

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upon its termination are fair and reasonable and do not unreasonably increase the common law rights of the subcontractor;

(3) The contractor made reasonable efforts to settle the settlement proposal of the subcontractor;

(4) The contractor gave prompt notice to the contracting officer of the initiation of the proceedings in which the judgment was rendered and did not refuse to give the Government control of the defense of the proceedings; and

(5) The contractor diligently defended the suit or, if the Government assumed control of the defense of the proceedings, rendered reasonable assistance requested by the Government.

(b) If the conditions in subparagraphs (a)(1) through (5) above are not all met, the TCO may allow the contractor the part of the judgment considered fair for settling the subcontract settlement proposal, giving due regard to the policies in this part for settlement of proposals.

(c) When a contractor and a subcontractor submit the subcontractor's settlement proposal to arbitration under any applicable law or contract provision, the TCO shall recognize the arbitration award as the cost of settling the proposal of the contractor to the same extent and under the same conditions as in paragraphs (a) and (b) above.

49.108-6 Delay in settling subcontractor settlement proposals.

When a prime contractor's inability to settle with a subcontractor delays the settlement of the prime contract, the TCO may settle with the prime contractor. The TCO shall except the subcontractor settlement proposal from the settlement in whole or part and reserve the rights of the Government and the prime contractor with respect to the subcontractor proposal.

49.108-7 Government assistance in settling subcontracts.

In unusual cases the TCO may determine, with the consent of the prime contractor, that it is in the Government's interest to provide assistance to the prime contractor in the settlement of a particular subcontract. In these situations, the Government, the prime

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contractor, and a subcontractor may enter into an agreement covering the settlement of one or more subcontracts. In these settlements, the subcontractor shall be paid through the prime contractor as part of the overall settlement with the prime contractor.

49.108-8 Assignment of rights under subcontracts.

(a) The termination for convenience clauses in 52.249, except the short-form clauses, obligate the prime contractor to assign to the Government, as directed by the TCO, all rights, titles, and interest under any subcontract terminated because of termination of the prime contract. The TCO shall not require the assignment unless it is in the Government's interest.

(b) The termination for convenience clauses (except the short-form clauses) also provide the Government the right, in its discretion, to settle and pay any settlement proposal arising out of the termination of subcontracts. This right does not obligate the Government to settle and pay settlement proposals of subcontractors. As a general rule, the prime contractor is obligated to settle and pay these proposals. However, when the TCO determines that it is in the Government's interest, the TCO shall, after notifying the contractor, settle the subcontractor's proposal using the procedures for settlement of prime contracts. An example in which the Government's interest would be served is when a subcontractor is a sole source and it appears that a delay by the prime contractor in settlement or payment of the subcontractor's proposal will jeopardize the financial position of the subcontractor. Direct settlements with subcontractors are not encouraged.

49.109 Settlement agreements.

49.109-1 General.

When a termination settlement has been negotiated and all required reviews have been obtained, the contractor and the TCO shall execute a settlement agreement on Standard Form 30 (Amendment of Solicitation/Modification of Contract) (see 49.603). The settlement shall cover (a) any